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Nos. 98-443 and 98-444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JANET KATHLEEN WAGNER,

Cross-Petitioner,

v.

MICHAEL C. DELEW, *et al.*,

Cross-Respondents.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; STATE OF NEVADA, EX REL.; NEVADA HIGHWAY PATROL; LIEUTENANT EDWARD JENSEN; SERGEANT RICHARD WOMACK; SERGEANT CURTIS ALBERT; SERGEANT THOMAS HARMON; DETECTIVE RICHARD HART; DETECTIVE WILLIAM JOHNSON; OFFICER WILLIAM SMITH; OFFICER KEITH BOWERS; OFFICER DAVID WAGNER; OFFICER GREG GOEN; SERGEANT WILLIAM ADAMSON; SERGEANT HARVEY WEATHERFORD; TROOPER JOSEPH A. SMITH; TROOPER GARTH GARDNER; TROOPER JOSEPH WYNGARD; AND TROOPER JAMES BARNUM,

Cross-Petitioners,

v.

MICHAEL C. DELEW, *et al.*,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

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CROSS-RESPONDENTS' COMBINED BRIEF IN OPPOSITION

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Cross-respondents Michael C. DeLew, individually, Michael C. DeLew as Special Administrator of the Estate of Erin Rae DeLew, H. Roy Mayberry, and Vickie Mayberry (the "DeLews") respectfully submit this combined response in opposition to the separate Conditional Cross-Petitions for Writ of Certiorari filed by petitioners Janet Kathleen Wagner ("Wagner") and the Las Vegas Metropolitan Police Department, Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner, and Officer Greg Goen (collectively referred to as the "Police Defendants").

STATEMENT OF THE CASE

Cross-Petitioners' separate statements of the case are replete with significant errors and omissions. In the interest of brevity, the DeLews refer the Court to and incorporate the accurate statement of the case in their own Petition for Writ of Certiorari. *See* Petition for Writ of Certiorari ("DeLews' Pet.") at 4-8.

Pursuant to Supreme Court Rule 15.2, the DeLews highlight Cross-Petitioners' most egregious misstatements:

1. Mrs. Wagner states that the DeLews have had full access to the laboratory reports concerning Janet Wagner's blood alcohol test and were able, over her objections, to have the remaining blood independently tested. Wagner Conditional Cross-Petition for Writ of Certiorari ("Wagner's Cross-Pet.") at 3. This is a half-truth at best. The investigating Police Defendants' deliberate disregard for standard operating procedures led to (a) a failure to perform a blood alcohol test within two hours of the fatal collision, and (b) a failure to take two blood draws separated by time. As a result of this aspect of the cover-up, the lab reports available to the DeLews were

of little use—they could not reveal the rate of dissipation of alcohol in Mrs. Wagner's system, and there was insufficient blood remaining for independent analysis. *See* Supplemental Appendix ("SA") to LVMPD's Conditional Cross-Petition for Writ of Certiorari ("Police Defendants' Cross-Pet.") 7, 8 (Complaint) at ¶ 22(b), (j).

2. Mrs. Wagner states that at no time have the DeLews been denied information concerning the details of the accident or the investigation that followed. Wagner's Cross-Pet. at 3. This is simply untrue. As noted above, a critical detail was just how drunk Mrs. Wagner was when her car struck Erin DeLew; but the defendants' sabotage of the investigation ensured that this information never would see the light of day. By deliberately failing to obtain percipient witness statements or to measure Mrs. Wagner's skid marks, the Police Defendants also guaranteed destruction of that critical evidence. Adding insult to injury, the defendants affirmatively misled the DeLews from the true facts, including through the issuance of a report that falsely blamed Erin DeLew for the collision. SA 7, 8 (Complaint) at ¶ 22(c)-(d), (f)-(h).

3. The Police Defendants inaccurately state that "the basal facts of the litigation" for purposes of reviewing the district court's and Ninth Circuit's distinct dismissal orders are "DELEWS' Complaint, the arguments and exhibits found in WAGNER'S Motion to Dismiss and its resultant progeny." Police Defendants' Cross-Pet. at 5. In fact, the only relevant allegations are those in the complaint. The lower courts were required to construe all those allegations in the light most favorable to the DeLews, as the nonmoving parties. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

4. The Police Defendants state that the Nevada Highway Patrol gave Mrs. Wagner a field sobriety test. Police Defendants' Cross-Pet. at 6-7. The Police Defendants know that she was given no such test—they administered only a horizontal gaze nystagmus ("HGN") test. SA 7 (Complaint) at

¶ 22(a). The HGN test involves shining a flashlight in the individual's eyes and asking her to follow the beam with her eyes. It does not test physical coordination and, perhaps more importantly, it does not have to be done in such a way that any bystanders can see the results of the test, as would be the case with an actual field sobriety test.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THIS COURT SHOULD DECLINE TO REVIEW THE NINTH CIRCUIT'S CONFIRMATION OF A WELL-ESTABLISHED CONSTITUTIONAL RIGHT—THE RIGHT TO MEANINGFUL ACCESS TO THE COURTS—WHERE THERE IS NEITHER A SPLIT AMONG THE CIRCUITS NOR ANY MERIT TO CROSS-PETITIONERS' ARGUMENTS.

The complaint alleges a police cover-up that denied the DeLews of their constitutional right of meaningful access to the courts. The Ninth Circuit agreed that this constitutional right exists.[1] Mrs. Wagner and the Police Defendants now ask this Court to grant their Cross-Petitions in order to hold that *there is no constitutional right of meaningful access to the courts*. This Court should decline that invitation for distinct reasons. *First*, the Court already has recognized the very right that Mrs. Wagner and the Police Defendants now attack, yet those parties offer no reason for the Court to overrule its earlier decisions. *Second*, the Police Defendants are incorrect

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[1] However, the Ninth Circuit then dismissed the DeLews' complaint on the grounds that the related state tort claims must be adjudicated before the DeLews may pursue their claims under §1983, and then the DeLews must show that "any" and "all" state remedies proved "ineffective." *DeLew v. Wagner*, 143 F.3d 1219, 1223 (9th Cir. 1998). This holding is contrary to established law and other circuit court decisions and is the subject of the DeLews' petition.

in contending that § 1983 liability for a police cover-up and conspiracy is contingent on the underlying wrong being a constitutional violation, and there is no good reason for the Court to review the Ninth Circuit's rejection of the Police Defendants' argument to that effect. *Third*, neither this Court's decisions nor cases from lower courts remotely support Cross-Petitioners' insistence that a litigant's ability simply to file a complaint establishes meaningful access to the courts. *Fourth*, the Ninth Circuit's recognition of the validity of the DeLews' constitutional claim creates no conflict among the lower courts.

A. This Court Already Has Recognized The Fundamental Right Of Meaningful Access To The Courts, Which Cross-Petitioners Now Seek To Eliminate.

In case after case, this Court has recognized the right of meaningful access to the courts. In *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907), the Court characterized "the right to sue and defend" as "one of the highest and most essential privileges of citizenship," which "lies at the foundation of orderly government." *See* DeLews' Pet. at 2 n.1 (citing this Court's decisions that have recognized the right of meaningful access to the courts under various constitutional provisions). In *Bounds v. Smith*, 430 U.S. 817, 820 (1977), the Court made clear that mere technical access is insufficient to comply with the Constitution; instead, access must be "adequate, effective and meaningful."

In light of these decisions, there is no good reason—and certainly none is advanced by Cross-Petitioners—for the Court to reconsider the existence of the right of meaningful access to the courts.

B. It Is Well-Established That § 1983 Cover-Up Liability Is Not Contingent On The Underlying

Wrong Being A Constitutional Violation; This Court Should Not Take On That Non-Issue.

Mrs. Wagner and the Police Defendants argue that the Ninth Circuit erred in recognizing the DeLews' claim of deprivation of the right of meaningful access to the courts because the underlying wrong—Mrs. Wagner's killing of Erin DeLew—was not an independent constitutional violation.[2] To the extent that Cross-petitioners' citation to cases might suggest a split among the circuits, this Court should not be misled. None of the cited decisions (nor any others of which counsel for the DeLews is aware) comes close to holding that a cover-up claim under § 1983 must allege a cover-up of a distinct constitutional violation.

The underlying wrongs in most of the cases that the Police Defendants cite at pages 10-12 of their Cross-Petition happened to be constitutional violations. However, in none of those cases did the court hold that the underlying action *must* have been a constitutional violation in order for a § 1983 cover-up claim to proceed. Those courts did not speak to the issue that Mrs. Wagner and the Police Defendants have invented here because the issue was not present in those cases. Rather, based on this Court's already-clear guidance, the lower courts "recognize a right of access to the courts without tying the right to some underlying federal right that the plaintiff wants access to the courts in order to enforce." *Peña v. Mattox*, 84 F.3d 894, 902 (7th Cir. 1996); *see also Jackson v.*

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[2] *See* Wagner's Cross-Pet. at 8 ("The plaintiffs [*sic*] claim that there [*sic*] right to 'meaningful access to the courts' has been denied because the traffic investigation was flawed and covered up evidence favorable to their claim . . . without the infringement of some other constitutional right, is not the basis for a valid claim under 42 U.S.C. § 1983."); Police Defendants' Cross-Pet. at 10 ("It is only when actions are undertaken to deliberately conceal or cover up constitutional violations that the protections of 42 U.S.C. § 1983 *may* be invoked to ensure proper redress.") (emphasis in original).

Procunier, 789 F.2d 307, 310 (5th Cir. 1986) (noting that from its inception the right of access to the courts has been applied to civil as well as constitutional claims, and that "interference with access to the courts may constitute the deprivation of a substantive constitutional right, . . . and may give rise to a claim under §1983").

The lower courts regularly have permitted § 1983 cover-up claims to proceed even where the underlying wrongdoing did not establish an independent constitutional violation. *See, e.g.*, *Vasquez v. Hernandez*, 60 F.3d 325, 326-27 (7th Cir. 1995) (underlying incident was negligent injury caused by drunk, off-duty policeman while target shooting at home) (dismissed on other grounds); *Foster v. City of Lake Jackson*, 28 F.3d 425, 427 (5th Cir. 1994) (underlying wrong was traffic fatality allegedly caused by city's negligence) (dismissed on other grounds); *Gibson v. City of Chicago*, 910 F.2d 1510, 1512-13 (7th Cir. 1990) (underlying wrong was shooting by officer on medical leave) (dismissed on other grounds); *Ryland v. Shapiro*, 708 F.2d 967, 969 (5th Cir. 1983) (underlying incident was murder by prosecutor who, needless to say, was acting outside of his prosecutorial duties); *Fisher v. City of Cincinnati*, 753 F. Supp. 681, 687 (S.D. Ohio 1990) (underlying wrong occurred when drunk, off-duty policeman injured plaintiff in automobile collision).

Thus, no lower court has accepted Cross-Petitioners' argument that the underlying, covered-up wrongdoing must have been an independent constitutional violation. Because neither the litigants nor the lower courts require any further direction on this non-issue, the Court should decline to address it on certiorari.

C. The Ninth Circuit Opinion Does Not Decide The Import Of A Party's Mere Ability To File A Complaint; In Any Event, The Law On This Issue Is Already Clear.

Mrs. Wagner and the Police Defendants argue that the Ninth Circuit erred in holding that the DeLews stated a claim for deprivation of their right of meaningful access to the courts despite the fact that they were able to file a wrongful death complaint in state court. According to Cross-Petitioners, the mere ability to file a complaint constitutes meaningful access, even where a conceded police cover-up and conspiracy has resulted in the destruction of the most favorable evidence to the plaintiffs, and in the fabrication of false evidence harmful to the plaintiffs' wrongful death action. *See* Wagner's Cross-Pet. at 9-10; Police Defendants' Cross-Pet. at 13-17.

In fact, the Ninth Circuit did not state the holding ascribed to it by Cross-Petitioners. To the contrary, the court of appeals *dismissed* the DeLews' § 1983 claim until the DeLews show that "any" and "all" state remedies have proven "ineffective." *DeLew v. Wagner*, 143 F.3d 1219, 1223 (9th Cir. 1998). For the reasons set forth in the DeLews' own Petition for Writ of Certiorari, the Ninth Circuit's dismissal was error, which this Court *should* review. But there is no reason to review a purported holding that does not even appear in the Ninth Circuit's decision, which Cross-Petitioners would have the Court do.

In addition, Cross-Petitioners' arguments fail on the merits. The Police Defendants' reliance on *Lewis v. Casey*, 518 U.S. 343 (1996), *see* Police Defendants' Cross-Pet. at 14-15, is particularly misplaced. *First*, *Lewis*, addresses prisoners' rights to petition the courts; it has nothing to do with governmental cover-up claims. *Second*, in *Lewis* the Court emphasized the tension between a prisoner's right to meaningful access to the courts and the state's interest in confinement of criminals, *id.* at 361; no such tension exists in

this case. *Third*, nothing in *Lewis* suggests that a non-prisoner's right to meaningful access to the courts is satisfied merely by the party's ability to file a complaint; the Court simply held that the government was not required to provide prisoners with full-time legal counsel to assist in discovering or litigating grievances. If *Lewis* has any relevance to this case, it is its reinforcement of the right of meaningful access confirmed in *Bounds*, and that this right is violated when state actors "hinder[ ]", "frustrate[ ]", or "impede[ ]" a party's access to the courts. *Id.* at 351-53.

Cross-Petitioners' lower court cases are equally inapposite. For example, their citation to *Foster*, *see* Wagner's Cross-Pet. at 10; Police Defendants' Cross-Pet. at 15 & n.5, is baffling. In that case, the Fifth Circuit expressly *declined* to hold that the right of meaningful access to the courts protects only the right to institute the action; instead the court held that at the time of the cover-up activities at issue (discovery abuses in a prior wrongful death action), it was not clearly established that the right to meaningful access encompassed abusive discovery conduct. *Id.* at 429; *see also, e.g.*, Police Defendants' Cross-Pet. at 15 (citing *Ryland*, for proposition that "'interference' associated with a 'cover-up' [is limited] to the filing of a complaint"; but *Ryland* in fact puts no limits on what constitutes "interference" triggering cover-up liability, *Ryland*,. 708 F.2d at 975).

In fact, in case after case, the lower courts have correctly recognized that the mere filing of a complaint does not automatically satisfy the constitutional right to adequate, effective, and meaningful access to the courts. *See, e.g.*, *Nielsen v. Clayton*, 62 F.3d 1419 (Table), 1995 WL 417569 at *7 (7th Cir. July 11, 1995) ("The violation of the right of access to the courts, however, need not necessarily entail or result in the denial of a party's right to pursue a claim in court."); *Jackson*, 789 F.2d at 310 ("Any deliberate impediment to access, even a delay of access may constitute a constitutional deprivation"); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261

(7th Cir. 1984) ("Though [plaintiff] filed a wrongful death claim in state court soon after the killing, the cover-up and resistance of the investigating police officers rendered hollow his right to seek redress . . . ."); *Gonsalves v. City of New Bedford*, 939 F. Supp. 921, 927 (D. Mass. 1996) ("[I]f the mere filing of a suit was sufficient in every case to extinguish a § 1983 claim for cover-up, the concept would be a nullity because the issue of cover-up is only presented to a court once a case is filed."); *Benton v. Bocian*, No. 86C5367, 1987 WL 26068, at * 4 (N.D. Ill. Dec. 1, 1987) ("[A]ny conduct by defendants that delayed [plaintiff's] ability to maintain this action deprived her of her protected right of access to the courts. The law does not recognize a distinction between a 27-day delay and a 20-year delay. . .").

In short, the Court should decline to grant certiorari review in order to hold, as Cross-Petitioners wish, that the filing of a complaint for the underlying wrong extinguishes a party's cover-up claim as a matter of law. The Ninth Circuit did not reach the opposite conclusion, there is no conflict with decisions of this Court or other circuits, and the issue does not warrant the Court's consideration.

D. The Ninth Circuit's Decision As To The Cognizability Of The DeLews' Constitutional Claim Does Not Create A Conflict Among The Circuits.

Both Mrs. Wagner and the Police Defendants argue that the Ninth Circuit's recognition of the DeLews' constitutional right of meaningful access to the courts conflicts with decisions both within and outside the Ninth Circuit. Wagner's Cross-Pet. at 7-8; Police Defendants' Cross-Pet. at 9-10. In fact, there is no conflict. Cross-Petitioners' conflict theory rests on a calculated mischaracterization of the DeLews' claims.

Throughout the proceedings below and now before this Court, Mrs. Wagner and the Police Defendants have tried to

ignore the DeLews' claim of a police cover-up and infringement of meaningful access to the courts. Instead, they have insisted on misstating the DeLews' claims as based only on an inadequate investigation. Cross-Petitioners are arguing a straw man—the viability of a claim of failure to investigate. That is not an issue in this case and it is not an issue decided by the Ninth Circuit.

Nowhere in the DeLews' complaint, briefs or arguments below do they mention or rely upon inadequate investigation as the basis for their § 1983 cause of action. The DeLews base their claim on the intentional subversion of the investigation by Mrs. Wagner and the Police Defendants—on those parties' malfeasance rather than nonfeasance. The DeLews allege that the Police Defendants, upon learning the circumstances of Erin DeLew's death, "successfully covered-up the true facts by: (1) deliberately refraining from performing a field sobriety test on Wagner; (2) deliberately refraining from performing a chemical blood alcohol test on Wagner within two hours of the fatal accident; (3) deliberately failing to preserve physical evidence such as skid marks and relevant debris; and (4) allowing Wagner to leave the scene of the accident," and that Mrs. Wagner conspired with them to take those affirmative steps to cover-up the true facts. *See DeLew*, 143 F.3d at 1221; *see also* SA 7-8, 15-16 (Complaint) at ¶¶ 22(a)-(j), 37 (failure to take witness statements, misrepresenting facts to plaintiffs and coroner's office investigator, issuing false police report).

Thus, there is no conflict with the Ninth Circuit's decision in *Gomez v. Whitney*, 757 F.2^{d} 1005 (9th Cir. 1985), or with the decisions of other circuits in *Scher v. Chief Postal Inspector*, 973 F.2d 682 (8th Cir. 1992), and *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996). In each of those cases, plaintiffs alleged a complete failure to investigate or an inadequate investigation; they were not deliberate cover-up cases and, as a result, they do not conflict with the Ninth Circuit's decision in this case.

Equally inaccurate are the Police Defendants' statements that "DELEWS does not contend LVMPD gave false information in the investigation or that they failed to properly perform a blood draw," and that "the Complaint only asserts LVMPD had the *authority* to conduct an investigation in a timely manner, but chose not to do so." Police Defendants' Cross-Pet. at 10 (emphasis in original). To the contrary, the complaint includes specific allegations that the Police Defendants gave false information, actively obstructed the investigation, and failed to properly perform a blood draw. SA 7-8, 15-16 (Complaint) at ¶¶ 22(a)-(j), 37. *See supra* 1-2 at ¶¶ (1)-(2). These affirmative acts, among others, rather than a merely faulty or negligent investigation, denied the DeLews of their constitutional right of meaningful access to the courts.

II.

CERTIORARI REVIEW IS INAPPROPRIATE WHERE THIS COURT'S DECISIONS AND THE ALLEGATIONS OF THE DELEWS' COMPLAINT FULLY SUPPORT THE NINTH CIRCUIT'S RECOGNITION OF THE DELEWS' CONSPIRACY CLAIM AGAINST MRS. WAGNER, AND THERE IS NO SPLIT AMONG THE CIRCUITS.

Mrs. Wagner asks this Court to review the Ninth Circuit's ruling that the DeLews' complaint states a claim against Mrs. Wagner for conspiracy in the Police Defendants' alleged cover-up. Wagner's Cross-Pet. at 11-13. But this issue does not warrant the Court's exercise of its certiorari jurisdiction. *First*, the Ninth Circuit's ruling finds clear support in this Court's decisions. *Second*, there is no split in the circuits that requires this Court's intervention on the conspiracy issue. *Third*, the Ninth Circuit's straightforward application of the well-established law regarding a private individual's liability for conspiracy under § 1983 was correct.

A. The Court Already Has Rejected Mrs. Wagner's Argument That A Conspiracy Claim Under § 1983 Must Allege Specific Facts To Show An Express Agreement Between The Actors.

Mrs. Wagner argues that the conspiracy allegations against her are deficient because they do not allege that she and the remaining defendants expressly agreed to commit an unlawful act. Wagner's Cross-Pet. at 11-13. In rejecting this argument, the Ninth Circuit relied on this Court's decision in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). *See DeLew*, 143 F.3d at 1223.

The *Adickes* case is indeed dispositive. There the Court held that § 1983 provides relief where the private and state actors "somehow reached an understanding" to deprive the plaintiff of a constitutional right. *Adickes*, 398 U.S. at 152. This holding remains good and fundamental law. Section 1983 does not require an express agreement. *See Lugar v. Edmundson Oil Co., Inc.*, 457 U.S. 922, 928 n.6 (1982) (joint action between private party and state official will support a § 1983 claim); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) ("It is enough that [a private party] is a willful participant in joint action with the state or its agents.").

Because the law on Mrs. Wagner's conspiracy issue is well-established, there is no reason for this Court to review the question on certiorari.

B. There Is No Split Among The Circuits On The Conspiracy Ruling.

In an apparent attempt to create an issue worthy of review on certiorari where none actually exists, Mrs. Wagner misstates the holdings of several cases from other circuits. The Court should reject any suggestion of a split in authority among the circuits.

Mrs. Wagner cites *Singer v. Wadman*, 595 F.Supp. 188 (D. Utah 1982), *aff'd* 745 F.2d 606 (10th Cir. 1984), for the proposition that "42 U.S.C. § 1983 does not apply to all conspiratorial tortious interferences with the rights of others, but only allege a [*sic*] those in which the plaintiff has alleged that the defendants agreed to commit an unlawful act." Wagner's Cross-Pet. at 11. However, *Singer* holds the exact opposite: "it is unnecessary that each participant in a conspiracy *expressly agreed* . . . ." *Singer*, 595 F.Supp. at 270 (emphasis added). The decision further states that "[t]he participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan . . . or possess the same motives . . . ." *Id.* at 271. The Tenth Circuit, in affirming *Singer*, makes no mention of a requirement of an agreement, but rather defines a civil conspiracy as "the combination of two or more persons acting in concert." *Singer*, 745 F.2d at 609.

Similarly, Mrs. Wagner's reliance on *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), is inexplicable. Wagner claims that *Hampton* stands for the proposition that "a conspiracy claim *must* include an agreement between the defendants to commit an unlawful act . . . ." Wagner's Cross-Pet. at 13. However, the Seventh Circuit actually held that "an express agreement among all the conspirators is not a necessary element of a civil conspiracy." *Hampton*, 600 F.2d. at 621. Rather, "it simply must be shown that there was 'a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences.'" *Id.* (citation omitted).

In short, the purported circuit conflict does not exist.

C. The Ninth Circuit Correctly Applied *Adickes* And Its Progeny To The DeLews' Complaint.

Stripped of the artificial circuit conflict, Mrs. Wagner actually seeks a review of the Ninth Circuit's application of

well-established law to the DeLews' complaint. But this Court has more important things to do. *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.) ("We do not grant a certiorari to review evidence and discuss specific facts.") (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)).

Equally important, Mrs. Wagner's position—that the DeLews failed to allege facts sufficient to support an inference of Mrs. Wagner's involvement in the conspiracy to cover-up the true facts surrounding her collision with Erin DeLew—is unsustainable on the merits. The complaint contains multiple paragraphs delineating the actions of the Police Defendants and Mrs. Wagner, and these allegations support an inference of an implied agreement or understanding between them to cover-up evidence of the true facts on September 27, 1994. *See* SA 7-8, 15-16 (Complaint) at ¶¶ 22(a)-(j), 37. Although the Ninth Circuit, in its decision, focused primarily on only one of the DeLews' allegations, *see DeLew*, 143 F.3d at 1223, its holding is even more correct when considered against the complaint's additional allegations of concerted conduct

III.

THIS COURT SHOULD DECLINE TO REVIEW THE NINTH CIRCUIT'S HOLDING THAT THERE WAS NO IMPROPER SPLITTING OF A CAUSE OF ACTION UNDER NEVADA LAW, WHERE THE ISSUE IS PURELY ONE OF STATE LAW AND WAS CORRECTLY RESOLVED.

In their third question presented, the Police Defendants challenge the Ninth Circuit's decision that there was not an improper splitting of causes of action. Police Defendants' Cross-Pet. at i, 17-19. This Court should deny the Cross-Petition on this issue. *First*, because Police Defendants raise an issue of pure state law, with no federal law ramifications, the question does not satisfy the Court's standards for the

exercise of its certiorari jurisdiction. *Second*, the Police Defendants' argument is utterly without merit.

A. Certiorari Is Inappropriate To Review The Ninth Circuit's Ruling On A Question Of Exclusively State Law.

The Police Defendants acknowledge that whether the DeLews split their cause of action by filing a separate complaint under § 1983 is a question of Nevada law. Police Defendants' Cross-Pet. at 18. But it is fundamental that this Court limits its certiorari jurisdiction to issues of federal—not state—law. Accordingly, the cause-of-action-splitting claim cannot meet the Court's guidelines for the exercise of jurisdiction.

Supreme Court Rule 10.1 lists "the character of reasons that will be considered" by the Court in deciding whether to accept a case for review on certiorari. Every one of the listed considerations implicates *federal* law. Significantly, Rule 10.1 omits one category of cases that appeared in the predecessor Supreme Court Rules, before their revision in 1990: a federal court of appeals decision that resolves "an important state or territorial question in a way in conflict with applicable state or territorial law." SUP. CT. R. 19.1(b) (1970) (repealed 1990). This change confirms the Court's disinterest in questions of state law. *See also* ROBERT L. STERN, *ET AL.*, SUPREME COURT PRACTICE 183 (7th ed. 1993) (Court "uniformly declines review" of court of appeals decisions alleged to conflict with state law on the ground of misapplication of state statutes and case law "whenever the court of appeals has reached a reasonable and permissible result").

The Court should adhere to its regular practice in this case and should refuse to review the Ninth Circuit's application of Nevada decisions to the Police Defendants' claim that the DeLews improperly split their cause of action. As discussed

below, there is nothing exceptional about this issue, and the Ninth Circuit reached "a reasonable and permissible" result.

B. The Ninth Circuit Correctly Applied Nevada Law.

Relying on the Nevada Supreme Court's decision in *Smith v. Hutchins*, 93 Nev. 431, 432-33, 566 P.2d 1136 (1977), the Ninth Circuit held that "[t]he rule against claim splitting is not applicable here" because "[t]he Nevada state court [as distinguished from the DeLews themselves] effectively split the Delews' [*sic*] causes of action by denying their motion to join the two actions in one proceeding." *DeLew*, 143 F.3d at 1223. This aspect of the Ninth Circuit's decision was undeniably correct.

It is undisputed that the DeLews attempted to amend their state court wrongful death complaint to add their § 1983 claim as soon as they learned, through discovery, that there had been a cover-up and a conspiracy to deny them meaningful access to the courts. *See* SA 22 (Transcript of Hearing on Motion to Amend). It is also undisputed that the state court denied their motion to amend, holding that the civil rights claim was a "separate cause of action" that could not be brought into the state wrongful death case. *Id.* at 26 ("I'm not going to allow you to amend the Complaint because I think you need to file a separate lawsuit . . .") (Becker, J.). Moreover, Mrs. Wagner vigorously opposed the DeLews' motion to amend their state claim, insisting that their only avenue was to file a separate lawsuit. *Id.* at 23-25.[3]

Even absent the events described above, there would have been no improper splitting of a cause of action. The Police Defendants rely on the Nevada Supreme Court's decision in *Smith*—the same case cited by the Ninth Circuit—for the proposition "'all forms of injury or damage sustained by

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[3] The Police Defendants were not yet parties to the state case and, therefore, they could not have opposed the motion to amend.

the plaintiff as a consequence of the defendant's wrongful act [must] be recovered in one action . . .'" Police Defendants' Cross-Pet. at 18 (quoting *Smith*, 566 P.2d at 1137). But the Police Defendants fail to acknowledge the critical differences between the DeLews' wrongful death claim and their § 1983 claim. The two causes of action do *not* arise out of the same wrongful act by a single defendant; they are *not* based on the same facts; and they would *not* rely upon the same evidence at trial.

The DeLews' wrongful death claim arises out of Mrs. Wagner's actions when, drunk, she caused her car to careen into Erin DeLew and killed the young bicyclist. The DeLews' § 1983 cause of action arises out of distinct conduct on the part of Mrs. Wagner and the Police Defendants. The civil rights claim is not based on Mrs. Wagner's drinking and driving, nor on her collision with Erin DeLew. It is based on a subsequent cover-up by Mrs. Wagner and state and city defendants who were not even involved in the collision and were not conceivably liable for Erin DeLew's wrongful death.

Under these combined circumstances, it is plain that the Ninth Circuit reached a reasonable result when it held that the DeLews had not split their cause of action.

CONCLUSION

For all of the reasons stated above, the Court should deny both conditional cross-petitions for writs of certiorari.

Respectfully submitted,

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